



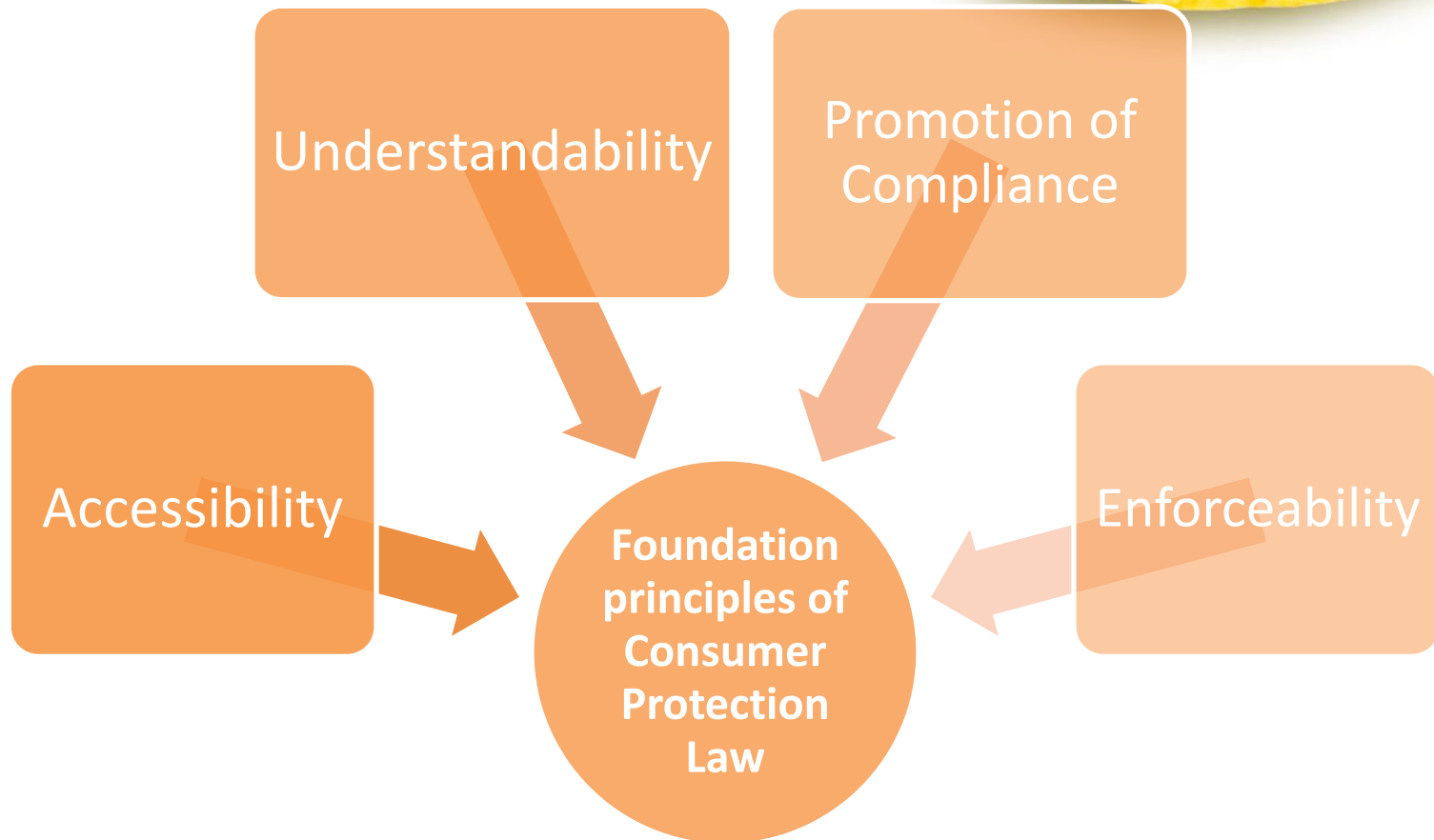
# Seminar on “When Life Gives You Lemon....”

## THE CONSUMER PROTECTION ACT 1999 AND FAIR TRADE PRACTICES IN MALAYSIA

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# Introduction



# The CPA - background

- The CPA came into force on the 15<sup>th</sup> November 1999. It has been influenced in one way or another by legal developments in the UK, Australia, New Zealand and Canada.
- It comprising of 14 parts and a total of 150 sections basically covers all the main areas of consumer protection, such as supply of goods, supply of services, trade practices, product safety and liability and redress mechanism.

# The Application

- Exclusive protection for consumers.
- The CPA applies only to consumer transactions (B2C) - ‘this Act shall apply in respect of all goods and services that are offered or supplied to one or more consumers in trade...” (s.2(1))
- A consumer is narrowly defined in section 3(1) as a person who:
  - (a) acquires or uses “consumer goods or services” and
  - (b) does not acquire or use the goods or services for commercial purposes listed in the section.

# Excluded from the CPA

A close-up photograph of a fresh orange slice, showing the juicy segments and the white pith, positioned in the top right corner of the slide.

- Securities as defined in the Securities Industry Act 1983;
- Futures contracts as defined in the Futures Industry Act 1993;
- Contracts made before the date on which the Act comes into operation;
- In relation to land or interest in land;
- Services provided by professionals who are regulated by any written law;
- Healthcare services or healthcare facilities.



# Regulations and Orders

Regulations	Orders
CP (The Tribunal for Consumer Claims) Regulations 1999	Consumer Protection (Future Services Contract Order) 2002
Consumer Protection (Future Services Contract Order) 2002	Consumer Protection (Prohibition Against Unsafe Goods) Order 2011
CP (Workshops Information Disclosure) Regulations 2002	
Consumer Protection (Prohibition Against Unsafe Goods) Order 2011	
CP (Safety Standards for Toys) Regulations 2009	
CP (Certificate of Conformance and Conformity Mark of Safety Standards) Regulations 2010	
C P (Credit Sale) Regulations 2012	
CP (Electronic Trade Transactions) Regulations 2012	
CP (Safety Standards for Primary Batteries) Regulations 2013	

# Amendments to the CPA

## 2002 Amendment

- Increased the Tribunal's jurisdiction from RM10,000 to RM25,000

## 2007 Amendment

- Extended the application of the CPA to electronic transactions

## 2010 Amendment

- Unfair contract terms
- Committee on advertisement
- Extension of the Tribunal power

# Business obligations under the CPA

Part 11

- Prohibition against misleading, deceptive, false representation and other unfair trade practices

Part 111

- Prohibition against unsafe products

Part V –  
VII

- Compliance with guarantees for goods

Part VIII  
& VIII

- Compliance with guarantees for services

Part X

- Strict liability for defective products



# Prohibition v. unfair trade practices under the CPA



# Compliance with mandatory guarantees

Supplier	Manufacturer
Guarantee as to title	-
Acceptable quality	Acceptable quality
Fitness for particular purpose	-
Comply with description	Comply with description
Comply with sample	-
Reasonable price	-
Availability of repairs and spare parts	Availability of repairs and spare parts

# Acceptable quality (s.32)



# Cont...

## Aspects of quality

fit for all purposes

Acceptable in  
appearance and finish

Free from minor defects

Safe

durable

## Expectation

Nature of the goods

The price

Statement on  
packaging/label

Representation

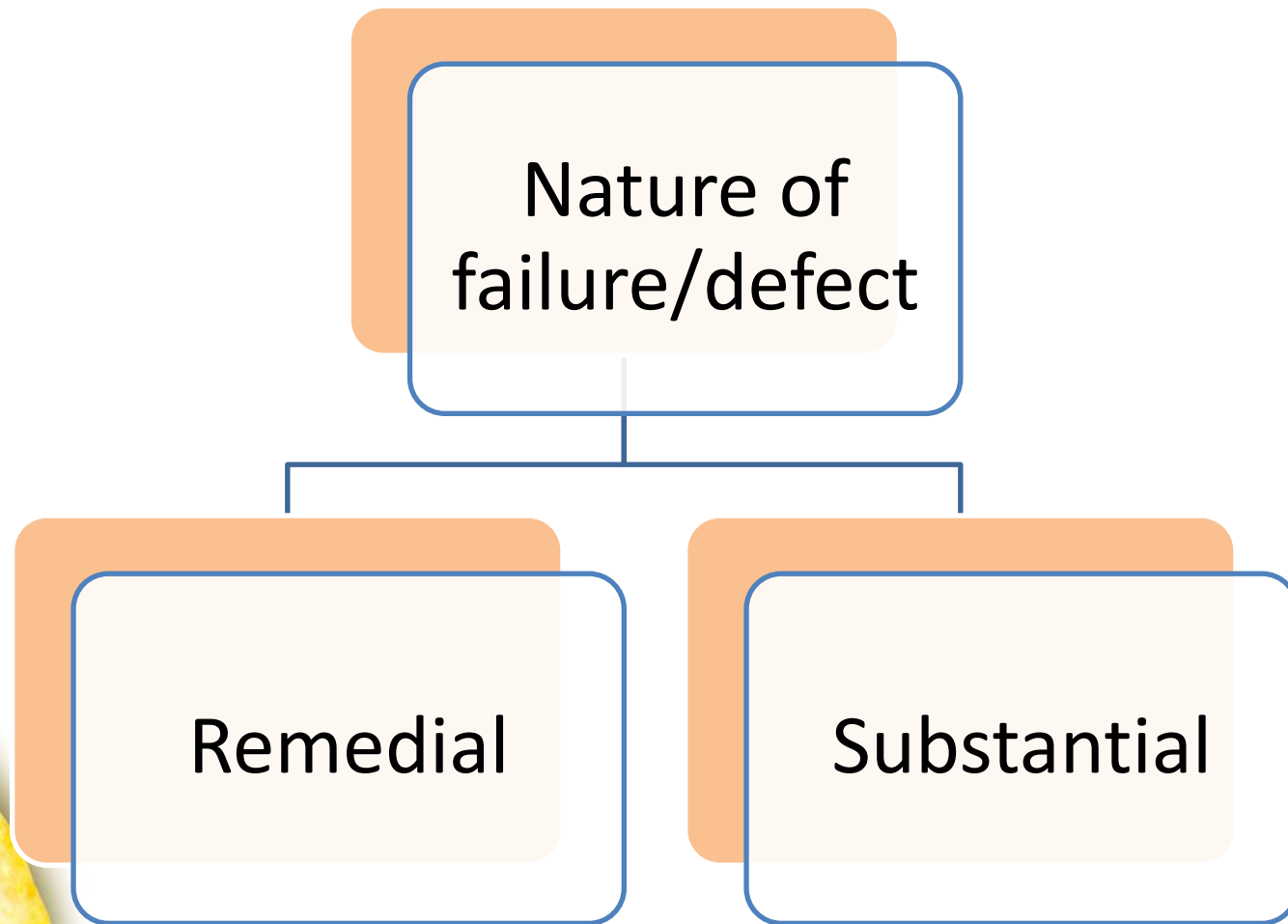
Other relevant  
circumstances



# Remedies for the consumers?

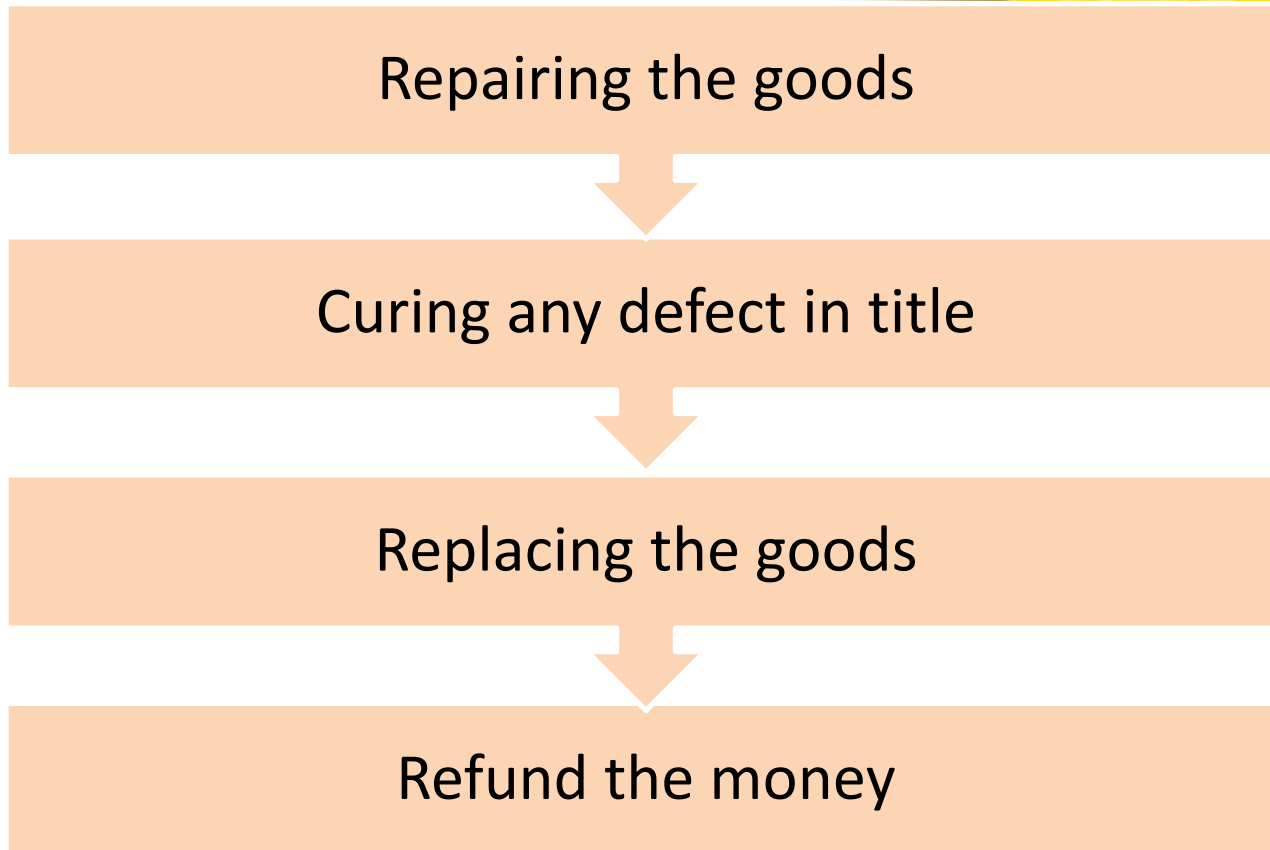
- Repair?
- Replace?
- Reject and Refund?
- Reduction in value?

# Liability for breach of guarantees





# Remedial failure



- The choice of remedy is left to the supplier

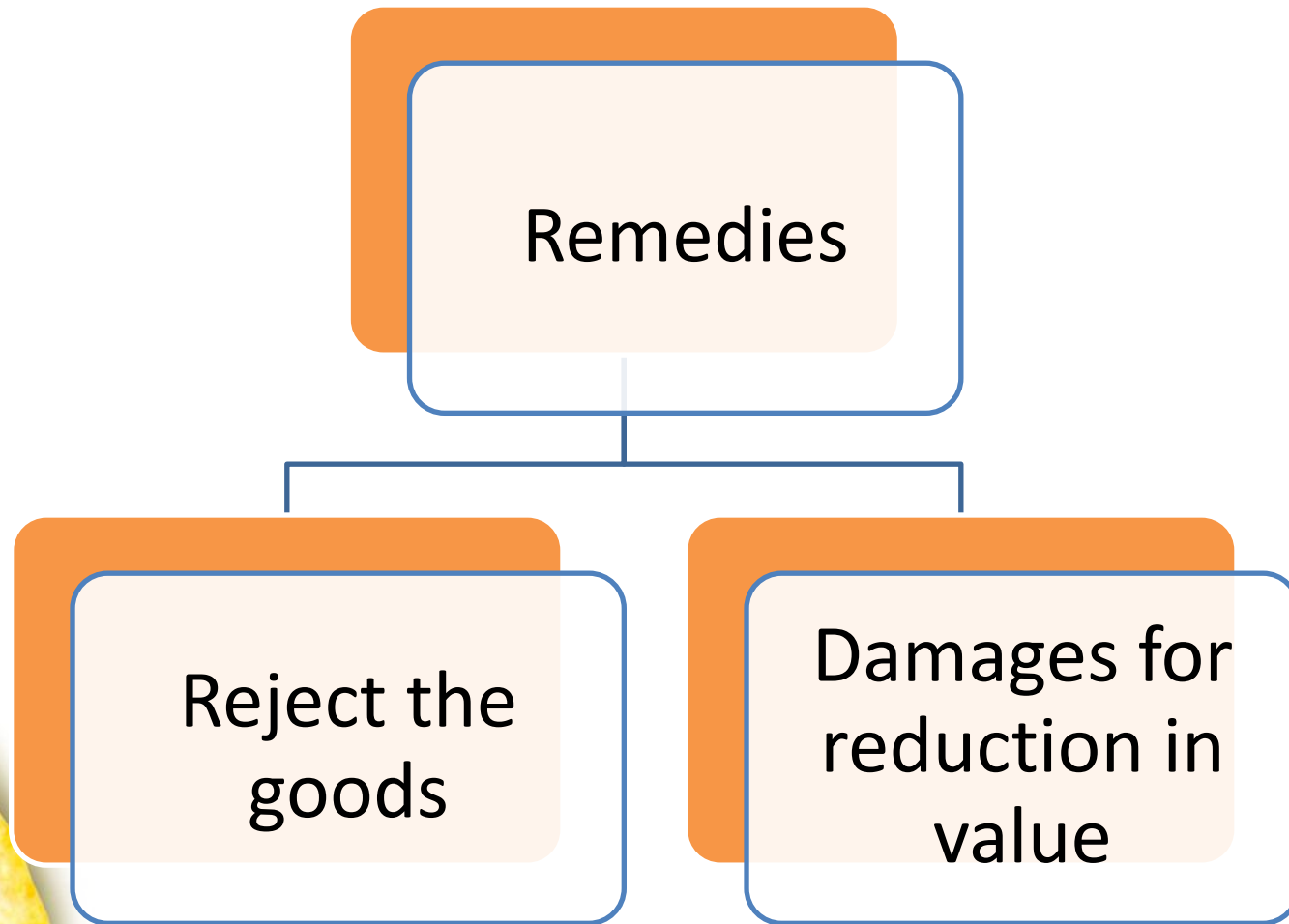
# Why repair?

- A remedy regime needs to balance the interests of the consumer's expectations with the supplier's need for finality in the transaction.
- The primary remedy in the CPA is based on the concept of seller cure (repair).
- Litigation is avoided and the consumer's claim is dealt with in the repair shop rather than in the Courts.
- Where a supplier refuses to remedy the problem or does not complete the repair within a reasonable time, the consumer is entitled to take the product to a third party for repair and recover reasonable repair costs.
- Alternatively, where the supplier refuses to repair, the consumer **may reject**.

# Meaning of substantial failure

- Section 44 lists down the characteristics of goods that can be categorised as having substantial defects:
  - (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
  - (b) the goods depart in one or more significant respects from the description or the sample;
  - (c) the goods are substantially unfit for the ordinary purpose or special purpose made known to the supplier;
  - (d) the goods are not of acceptable quality due to safety reasons.

# Substantial failure



# Loss the right to reject

- A consumer may loss the right to reject the goods in the following circumstances:
  - (a) the right is not exercised within a reasonable time;
  - (b) the goods have been disposed by the consumer;
  - (c) the goods have been lost or destroyed while in the possession of a person other than the supplier;
  - (d)...
  - (e)...

# Reasonable time

- Section 43(2) defines “reasonable time” as a period from the time of the supply of the goods within which it would be reasonable to expect the defect to become apparent having regard to the type of goods, manner of usage, length of usage and the amount of usage.
- What is reasonable time is a question of fact that will be decided based on the fact of each particular case.
- Subject to different interpretation of the court.



# Effect of rejection

- A consumer can either claim –
  - (a) a refund of money paid;
  - (b) a replacement of the same type of goods;
  - (c) a replacement of similar value goods.
- the supplier is obliged to comply with a consumer's choice of remedy (s.46(1)).
- A refund must be in cash of the money paid or the value of any other consideration provided or both.
- Whether a consumer can claim a refund in full ??

# Court Cases - defective motor vehicle

- *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd.* (2012)
- The plaintiff took delivery of a brand new luxury Mercedes Benz motor vehicle in April 2006. The car could not start on seven separate occasions. The plaintiff decided to return the car on May 2007.
- Decision: The car was not in fact and in law of an acceptable quality.
- The defect was substantial which entitled the plaintiff to reject the car.

## Lessons from *Puncak Niaga's* case

- A company can be a consumer and gets protection under the CPA.
- The “substantial defect” might either exist as a latent defect at the time of purchase or it might result because of an accumulation of more minor defects which in themselves could not be described as “substantial”.
- Time to reject would begin to run when the consumer could be said to have lost confidence in the reliability of the vehicle.
- Repeated efforts to have the goods repaired does not affect the consumer’s ultimate right to reject.

# *Ong Siew Hwa v UMW Toyota Motors Sdn Bhd & Anor (2014)*

- The Plaintiff purchased a Toyota Camry from the first defendant (the car dealer) and subsequently entered into a hire-purchase agreement with the second defendant (associated company under UMW Group).
- On the day he collected the car, the Plaintiff complained that the car was wobbling and the steering was pulling to the left side.
- Within a period of nine months the Plaintiff had to take the car to the first defendant workshop nine times where he finally left the car there.

# Decision

- The car was not of acceptable quality under the CPA and not of merchantable quality under the Hire-purchase Act.
- The plaintiff is entitled to reject and return the car and claim for refund.
- However since this is hire-purchase agreement, the claim can only be made against the owner (financier).
- Continued payment of the installment does not affect the consumer's ultimate right to reject.

# Sheila a/p Sangar v. Proton Edar Sdn. Bhd & Anor [2009]

- The applicant bought a new Proton Iswara car. During the first service at the Proton Edar Service Centre, her husband complained about the car breaks.
- During the third service, about three months after the purchase of the car, the husband also complained about the brakes.
- On the same day, when her husband took the car from the service centre and was driving home, he collided with another car in front because the brakes failed.
- The respondent submitted the documentary evidence that the brake performance had been tested and passed by PUSPAKOM.
- The Tribunal rejected the Plaintiff's claim for lack of evidence.
- The decision was subsequently confirmed by the High Court in the judicial review proceeding filed by the plaintiff.



## 2010 Amendment – protection v. unfair contract terms

- A new Part IIIA has been inserted into the CPA to specifically deal with unfair contract terms in all consumer contracts.
- Meaning of unfair term – “a term in a consumer contract which, with regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer”

# Assessment of unfairness

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- The CPA has adopted a new approach of dividing unfairness into ‘procedural’ and ‘substantive’ unfairness.
- **Procedural unfairness** looks at the process of making a contract
- **Substantive unfairness** concerns the out-come of the process – i.e. the content or substance of the contract.

# Procedural unfairness - factors to be considered

## Transparency

- Whether the terms are in fine print or are difficult to read or understand”
- the extent to which a term or its legal or practical effect was accurately explained to the consumer

## Equality of bargaining power

- the bargaining strength of the parties to the contract relative to each other
- whether or not, prior to or at the time of entering into the contract, the terms of the contract were subject to negotiation or were part of a standard form contract


## Consumers' disabilities

- unable to appreciate adequately the contract or a term of the contract or its implications by reason of age, sickness, or physical, mental, educational or linguistic disability, or emotional distress or ignorance of business affairs

# Substantive Unfairness

- 
- 
- Harsh, oppressive or unconscionable

- 
- excludes or restricts liability for negligence

- 
- excludes or restricts liability for breach of express or implied terms of the contract without adequate justification

# Practical implication

- Business organizations particularly those dealing with a standard form contract need to review their procedure before and at the time of signing a contract to ensure transparency and intelligibility.
- They also need to review all terms in their contracts to avoid contravention with the principles of substantive fairness.
- Part IIIA should also be seen as incentive for traders to compete with one another by offering terms that better reflect consumer interest.

# Tribunal cases

- *Liew Li Ming v Excel College of Training & Development* (2011).
- The Tribunal for Consumer Claims decided that “any non-refundable term incorporated into any contract is deemed to be unfair contract terms”.
- The same judgement can be found in *Che Mohd Hashim Abdullah v Air Asia X Sdn Bhd* (2011)



## Advice to the business

- Repair, replace, refund and compensation for defective products is now part of Malaysian law.
- They need to have “Return and refund policy”.
- Those who already have such a policy in place, they need to review the policy to be in line with the CPA remedial scheme and complied with regulations on unfair contract terms.
- Obviously “See you in Tribunal/Court” is not a good policy.

# Conclusion



- The present guarantees scheme under the CPA is based on the New Zealand CGA 1993 which has been recognised to be more accessible to consumers (has formed the basis for the new Australian Consumer Law 2010 (ACL).
- Nonetheless the accessibility, understandability, promotion of compliance and enforceability of the CPA is yet to be proven.
- If the incorporation of the so called 'Lemon law' could improve the CPA in achieving those objectives, this motion should be strongly supported.

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# THANK YOU